Kassim @ Osman bin Ahmad v Dato' Seri Jamil Khir bin Baharom & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO 25–119–06 OF 2014
ZALEHA YUSOF J
14 JULY 2014

Civil Procedure — Judicial review — Application for — Allegation that respondent wrongfully raided and searched applicant's house — Applicant wrongfully arrested, detained and removed from Kedah to Wilayah Persekutuan — Applicant prosecuted in Syariah Court without relevant documents — Whether civil court had jurisdiction — Whether abuse of court process — Syariah Criminal Offences (Federal Territories) Act 1977 ss 7(b) & 9

This was the applicant's application for leave to commence judicial review against the decision, action and/or omission of the respondents who the applicant alleged had wrongfully raided and searched the applicant's house in Kedah and later wrongfully arrested, detained and removed the applicant from Kedah to Wilayah Persekutuan; followed by the decision to prosecute him in the Syariah Court and refusing to provide him with relevant documents. The applicant also sought to stay of all the actions by the second and third respondent against him, pending the disposal of this application, including the prosecution in the Syariah Court. The senior federal counsel raised a preliminary objection concerning the jurisdiction of this court to deal with the application and argued that this application was an abuse of court process as there was currently a prosecution pending against the applicant before the Syariah Criminal High Court in Putrajaya, under ss 7(b) and 9 of the Syariah Criminal Offences (Federal Territories) Act 1977 ('Act 559'). It was further argued that these offences were within exclusive jurisdiction of the Syariah Court and by virtue of art 121 of the Federal Constitution, the civil court had no jurisdiction in the subject matter that falls exclusively in Syariah Court.

Held, dismissing the application:

(1) This court had no jurisdiction to hear this matter as the subject matter fell exclusively within in the jurisdiction of the Syariah Court. Act 559 is applicable to persons professing the religion of Islam as long as the offence is committed in the Federal Territory. It does not say that the person must be resident of Federal Territories only. Even ss 7 and 9 of Act 559 use the words 'any person' (see paras 13–14).

(2) In a judicial review, what is sought to be done is for this court to look into the decision making process and the ultimate action of the public authority; to ensure the exercise of power is done properly and not improperly or mistakenly. As decided by the Court of Appeal in *Siti Hasnah Vangarama*'s case, it is not the intention of art 121 of the Federal Constitution that a subject matter of a claim or complaint automatically ceases to be within the jurisdiction of the civil courts just because it has an Islamic Law element in it (see paras 7–8).

[Bahasa Malaysia summary

Ini adalah permohonan pemohon untuk izin memulakan semakan kehakiman terhadap keputusan, tindakan dan/atau ketinggalan responden-responden yang pemohon mendakwa telah secara salah menyerbu dan memeriksa rumah pemohon di Kedah dan kemudiannya menangkap, menahan, menghantar secara salah pemohon dari Kedah ke Wilayah Persekutuan; diikuti dengan keputusan untuk mendakwa dia di Mahkamah Syariah dan menolak daripada memberikan kepadanya dokumen-dokumen relevan. Pemohon juga memohon untuk menangguhkan kesemua tindakan oleh responden kedua dan ketiga terhadapnya, sementara menunggu perlepasan permohonan ini, termasuk pendakwaan di Mahkamah Syariah. Peguam kanan persekutuan membangkitkan bantahan awalan berkaitan bidang kuasa mahkamah ini untuk menguruskan permohonan ini dan berhujah bahawa permohonan ini adalah penyalahgunaan proses mahkamah kerana pada masa ini terdapat pendakwaan yang masih belum didengar terhadap pemohon di hadapan Mahkamah Tinggi Jenayah Syariah di Putrajaya, di bawah ss 7(b) dan 9 Akta Kesalahan Jenayah Syariah (Wilayah Persekutuan) 1977 ('Akta 559'). Ia selanjutnya dihujahkan bahawa kesalahan-kesalahan ini adalah dalam bidang kuasa eksklusif Mahkamah Syariah dan mengikut perkara 121 Perlembagaan Persekutuan, mahkamah sivil tidak mempunyai bidang kuasa dalam perkara yang terangkum dalam Mahkamah Syariah.

Diputuskan, menolak permohonan:

(1) Mahkamah ini tidak mempunyai bidang kuasa untuk mendengar perkara ini memandangkan perkara terangkum secara eksklusif dalam bidang kuasa Mahkamah Syariah. Akta 559 terpakai kepada individu yang beragama Islam asalkan kesalahan dilakukan di Wilayah Persekutuan. Ia tidak menyatakan bahawa orang tersebut mestilah residen Wilayah Persekutuan sahaja. Bahkan ss 7 dan 9 Akta 559 menggunakan perkataan-perkataan 'any person' (lihat perenggan 13–14).

(2) Dalam semakan kehakiman, apa yang dipohon untuk dilakukan adalah untuk mahkamah ini mengkaji proses membuat keputusan dan tindakan penting pihak berkuasa am; untuk memastikan perlaksanaan kuasa dilakukan secara betul dan bukan secara tidak betul atau secara silap.

Seperti yang diputuskan oleh Mahkamah Rayuan dalam kes *Siti Hasnah Vangarama*, ia bukan niat perkara 121 Perlembagaan Persekutuan bahawa perkara dalam tuntutan atau aduan berhenti secara automatik dalam bidang kuasa mahkamah sivil hanya kerana ia mempunyai unsur undang-undang Islam di dalamnya (lihat perenggan 7–8).]]

Notes

For cases on application for judicial review, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 5575–5579.

Cases referred to

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228, SC (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (refd)

Azizah bte Shaik Ismail & Anor v Fatimah bte Shaik Ismail & Anor [2004] 2 MLJ 529, FC (refd)

Berjaya Books Sdn Bhd & Ors v Jabatan Agama Islam Wilayah Persekutuan & Ors [2014] 1 MLJ 138; [2013] 1 LNS 1346, HC (refd)

Eastern & Oriental Hotel [1951] Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1992] 2 CLJ Rep 366, HC (refd)

Laker Airways Ltd v Department of Trade [1977] QB 643, CA (refd)

Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2007] 5 MLJ 101; [2007] 5 CLJ 253, FC (refd)

Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors [2003] 3 MLJ 705, FC (refd)

Manoharan Malayalam & Anor v Dato' Seri Hj Mohd Najib bin Tun Abdul Razak & Ors [2013] 2 MLJ 725; [2013] 1 LNS 297; [2013] 4 AMR 309, CA (refd)

Siti Hasnah Vangarama Abdullah v Tun Dr Mahathir Mohamad (as the President of Perkim) & Ors [2012] 7 CLJ 845, CA (folld)

Legislation referred to

Federal Constitution art 121
Kedah Syariah Enactments
Rules of Court 2012 O 53 r 3(6)
Syariah Criminal Offences (Federal Territories) Act 1977 ss 1(2), 7(b), 9

Rosli bin Dahlan (Abdullah Khubayb and Ho Ai Ting with him) (Lee Hishamuddin Allen & Gledhill) for the applicant.

Suzana Atan (Maisarah Juhari with her) (Senior Federal Counsels, Attorney General's Chambers) for the respondents.

Zaleha Yusof J:

[1] This is the applicant's application for leave to commence judicial review against the decision, action and/or omission of the respondents who the applicant alleges had wrongfully raided and searched the applicant's house in Kedah and later wrongfully arrested, detained and removed the applicant from Kedah to Wilayah Persekutuan; followed by the decision to prosecute him in the Syariah Court and refusing to provide him with relevant documents. The applicant also seeks to stay of all the second and third respondent's action against him, pending the disposal of this application, including the prosecution in the Syariah Court.

[2] There is no dispute that this application was made well within the three months period provided for by O 53 r 3(6) of the Rules of Court 2012. Hence, the duty of the applicant now is to show that he has a prima facie case and that his application is not frivolous or vexatious. Refer to the Supreme Court in *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228.

[3] At the hearing of this leave application, Puan Suzana Atan, the learned senior federal counsel who appears on behalf of the Attorney General's Chambers has raised a preliminary objection concerning the jurisdiction of this court to deal with the application. She argues that this application is an abuse of court process as there is currently a prosecution pending against the applicant before the Syariah Criminal High Court in Putrajaya, under ss 7(b) and 9 of the Syariah Criminal Offences (Federal Territories) Act 1977 ('Act 559'). These offences, she argues, are within exclusive jurisdiction of the Syariah Court. Hence by virtue of art 121 of the Federal Constitution the civil court has no jurisdiction in the subject matter that falls exclusively in Syariah Court.

[4] Encik Rosli Dahlan, learned counsel for the applicant has argued that this being a judicial review, what is sought to be done is to look into the decision making process and the ultimate action of the public authorities who are in the instance, the respondents herein. Judicial review she argues, lies exclusively before the High Court and reliefs of certiorari, mandamus are reliefs that can only be granted at the civil court. In his written reply which was filed later, the applicant argues that this application is not just about ss 7(b) and 9 of Act 559. There are many other issues involved like the interpretation of different state Islamic laws and whether the applicant is bound by Act 559 when he is a resident of Kedah. Further, the applicant is seeking a judicial review to challenge the entire process of, amongst others, the following:

(a) the applicant's wrongful detention and arrest;

(b) JAWI's failure to comply with the FT Syariah Acts;

(c) JAWI's failure to comply with the Kedah Syariah Enactments;

(d) the above acts which culminated in the wrongful prosecution of the applicant;

(e) the chief prosecutor's refusal to produce documents;

(f) the chief prosecutor's failure to reply to the representation and continue with the prosecution; and

(g) the Minister Agama's failure to reply to the representation.

[5] Further the applicant submits, the Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 and in the case of *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2007] 5 MLJ 101; [2007] 5 CLJ 253 had held that the position of Syariah Court is similar to the sessions and the magistrate's court and the High Court therefore has a supervisory jurisdiction over its proceedings and decisions. The appellant also refers to the Court of Appeal decision in *Manoharan Malayalam & Anor v Dato' Seri Hj Mohd Najib bin Tun Abdul Razak & Ors* [2013] 2 MLJ 725; [2013] 1 LNS 297; [2013] 4 AMR 309 to argue that in a case where the complaint of the plaintiff is that the federal government or its agent has violated the Federal Constitution by its action or legislation, he has the locus to bring an action to declare the action of the federal government or its agent as being unconstitutional. The applicant also argues, following the decision of the Court of Appeal which was not overruled on appeal by the Federal Court, in *Siti Hasnah Vangarama Abdullah v Tun Dr Mahathir Mohamad (as the President of Perkim) & Ors* [2012] 7 CLJ 845, a subject matter of a claim or complaint does not automatically cease to be within the jurisdiction of the civil court just because it has an Islamic law element.

DECISION

[6] I have perused the cause papers and submissions made by the parties including the latest submission filed by the applicant which I have marked as (C) and (C1) respectively.

[7] I fully agree with learned counsel for the applicant that as decided by the Court of Appeal in *Siti Hasnah Vangarama*'s case, it is not the intention of art 121 of the Federal Constitution that a subject matter of a claim or complaint automatically ceases to be within the jurisdiction of the civil courts just because it has an Islamic Law element in it.

[8] I also fully agree with the applicant that in a judicial review, what is sought to be done is for this court to look into the decision making process and the ultimate action of the public authority; to ensure the exercise of power is done properly and not improperly or mistakenly. See Lord Denning MR in *Laker Airways Ltd v Department of Trade* [1977] QB 643 which was cited and applied in *Eastern & Oriental Hotel [1951] Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1992] 2 CLJ Rep 366.

[9] The applicant in this case is seeking for various remedies. By merely looking at those remedies, as shown in his prayer in encl (1), like this court's decision in *Berjaya Books Sdn Bhd & Ors v Jabatan Agama Islam Wilayah Persekutuan & Ors* [2014] 1 MLJ 138; [2013] 1 LNS 1346, I would without doubt says that this court clearly has jurisdiction to hear this application. But that is not the only consideration.

[10] The Federal Court, in *Azizah bte Shaik Ismail & Anor v Fatimah bte Shaik Ismail & Anor* [2004] 2 MLJ 529 and in *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v Shaik Zolkaffily bin Shaik Natar & Ors* [2003] 3 MLJ 705 had made it clear that when there is a dispute concerning a question of jurisdiction of the Syariah Court and the civil court, the approach to be taken is the subject matter approach and not the remedy prayed approached.

[11] The applicant had been arrested, detained and later prosecuted under ss 7(b) and 9 of Act 559. This application had been filed and this court had been requested by the applicant to hear it on an urgent basis, as the charge against the applicant in the Syariah Court is about to be heard on 16 July 2014. The applicant had also asked for the prosecution in the Syariah Court to be stayed pending the disposal of the judicial review. He was arrested, detained and later prosecuted because of the offence under those provisions of Act 559 which he was alleged to have committed. Hence, on that basis and upon scrutinising the cause papers, I agree with the learned senior federal counsel that the crux of the matter here is actually the purported offence under ss 7(b) and 9 of Act 559. Those offences, unlike the offence in *Berjaya Book Store*'s case, are exclusively within the jurisdiction of the Syariah Court. Even the Court of Appeal in the case of *Siti Hasnah Vangarama*'s case had decided that:

> In our view, the current position in law is that only if the subject matter of the action is exclusively within the jurisdiction of the Syariah Court would the subject-matter, by virtue of art 121(1A) of the Federal Constitution, fall outside the jurisdiction of the civil courts.

[12] I must also mention, that although the applicant is a resident of Kedah, the alleged offence was purportedly committed in the Federal Territory. Section 1(2) of Act 559 provides that:

> (2) This Act shall apply only —

(a) to the Federal Territories of Kuala Lumpur and Labuan;

And

(b) to persons professing the religion of Islam.

[13] It is thus clear that Act 559 is applicable to persons professing the religion of Islam as long as the offence is committed in the Federal Territory. It does not say that the person must be resident of Federal Territories only. Even ss 7 and 9 of Act 559 use the words 'any person'.

CONCLUSION

[14] Based on the above, I therefore agree with the preliminary objection raised by the learned senior federal counsel that this court has no jurisdiction to hear this matter as the subject matter falls exclusively within in the jurisdiction of the Syariah Court. In the circumstance, this application for leave to commence judicial review proceeding is dismissed with no order as to cost.

Application dismissed.

Reported by Afiq Mohamad Noor